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SUPREME COURT, U.S.

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No. 07-653

In The Supreme Court of the United States

LARRY NORRIS, Director,
Arkansas Department of Correction,

Petitioner,

v.

SEDRICE MAURICE SIMPSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

The Petition for a Writ of Certiorari demonstrated that the Eighth Circuit's decision directly conflicts with this Court's decision in *Dugger v. Adams*, 489 U.S. 401 (1989). Nothing in the Brief in Opposition calls into question the need for this Court to grant certiorari.

REASONS FOR GRANTING THE WRIT

I. The Question Presented Was Argued and Decided Below.

The question presented was both argued by the parties and decided by the Eighth Circuit. This is so despite the absence of any argument or decision applying the adequate and independent state ground doctrine, and despite the Eighth Circuit's failure to apply *Adams* before rejecting petitioner's argument that the novelty of *Atkins v. Virginia*, 536 U.S. 304 (2002), did not excuse the default of respondent's mental-retardation claim.

It was not necessary for the parties to argue, or the courts below to analyze, whether respondent's *Atkins* claim was barred by an adequate and independent state procedural rule. Respondent made that unnecessary when he acknowledged the default in his petition and appellate brief, wherein he relied on *Reed v. Ross*, 468 U.S. 1, 16 (1984), and asserted that

Atkins's novelty excused his failure to raise his mental-retardation claim in state court. *Simpson v. Norris*, No. 5:04-CV-429, Docket Entry No. 1, Petition for Writ of Habeas Corpus, at 18; *Simpson v. Norris*, No. 06-2823, Brief of Appellant, at 14-15. Accordingly, petitioner's arguments below, and the lower court decisions, were correctly focused on whether *Atkins* excused the default, despite the availability of a mental-retardation claim under state law.

Moreover, this Court considers new arguments supporting claims that parties have consistently pressed below, *see Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995), and, although petitioner did not expressly rely on *Adams* until his petition for rehearing *en banc*, *see Simpson v. Norris*, No. 06-2823, Petition for Rehearing at 8, n.3, he consistently argued that *Atkins*'s previous unavailability did not excuse respondent's acknowledged default because a mental-retardation claim was previously available to him under Ark. Code Ann. § 5-4-618. *Simpson v. Norris*, No. 5:04-CV-429, Docket Entry No. 4, Response to Petition for Writ of Habeas Corpus, at 91, 92; *Simpson v. Norris*, No. 06-2823, Brief of Appellee, at 1-3, 4-5. Indeed, in his brief before the Eighth Circuit, respondent himself framed the issue in a manner that foreshadows the question presented here: "[t]he issue presents, *inter alia*, the question whether an Eighth Amendment retardation claim under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002), can be defaulted by a failure to raise a state statutory retardation claim before *Atkins*

was decided." *Simpson v. Norris*, No. 06-2823, Brief of Appellant, at 14. Accordingly, the question presented was argued below.

Additionally, the Eighth Circuit decided the question. Although the District Court's opinions do not clearly evince the distinction between 28 U.S.C. § 2254(e)(2) and procedural default, the Eighth Circuit's opinion does.[1] As respondent recognizes, the Eighth Circuit could not very well conclude that he was entitled to an evidentiary hearing on his *Atkins* claim without first excusing his procedural default. Brief in Opposition at 5 (stating the effect of the procedural default rule, "where it applies, is to bar a claim from being considered on the merits altogether, whether or not new factual development would be required"). The Eighth Circuit apparently understood the issue as respondent framed it, *i.e.*, "that the district court erred in holding that he had defaulted an eighth amendment claim under *Atkins*," Appendix at 10, and separated its brief discussion of procedural default from its application of § 2254(e)(2):

> We think, contrary to the district court's holding, that the availability of a similar claim under Arkansas law is irrelevant to our consideration here: Mr. Simpson is raising a

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[1] The dissenting judges apparently recognized the majority's distinction, Appendix at 75, and the Eighth Circuit, applying *Simpson* in a similar case, *see infra* at 4, views it as a decision on the doctrine of procedural default. *See Jackson v. Norris*, No. 07-1331, 2007 WL 4117786 (8th Cir. 2007).

> previously unavailable federal claim, and that claim is separate and distinct. We conclude, *moreover*, that because the state claim is distinct from the eighth amendment claim, the district court incorrectly required Mr. Simpson to meet the requirements of § 2254(e)(2) before holding an evidentiary hearing."[2]

Appendix at 11 (emphasis added). The Eighth Circuit's failure to apply *Adams*, or to analyze whether any part of a mental-retardation claim under Arkansas law was a necessary element of respondent's *Atkins claim* before excusing the default is not fatal to the petition, as respondent contends. Brief in Opposition at 6. Actually, that is precisely the point. Had it not rested its analysis on the technical distinction between state and federal claims, and dismissed the availability of a claim under the state statute as irrelevant, Appendix at 11, the Eighth Circuit's opinion might well have the analysis that respondent now agrees is missing. That it does not is reason to grant, not deny, the Petition for a Writ of Certiorari.

Finally, it is unlikely that an intervening decision by the Eighth Circuit will adopt petitioner's position, and thereby eliminate the question presented, as

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[2] Respondent conveniently omits the word "moreover," indicating that the Eighth Circuit's conclusions regarding the application of § 2254(e)(2) follow another (excusing the default), from his quotation of the Eighth Circuit's opinion. Brief in Opposition at 4.

respondent contends. Brief in Opposition at 6. As stated, the question presented was squarely argued in, and decided by, the Eighth Circuit. A subsequent decision by the court confirms, moreover, that it will apply *Simpson* to excuse the procedural defaults of mental-retardation claims asserted by other Arkansas inmates. In *Jackson v. Norris*, No. 07-1331, 2007 WL 4117786 (8th Cir. 2007), the Eighth Circuit applied *Simpson* to vacate another judgment that held that *Atkins* did not excuse the default of a mental-retardation claim that could have been raised under Ark. Code Ann. § 5-4-618.[3] While doing so, the Eighth Circuit parenthetically described the holding in *Simpson* as "concluding the existence of an Arkansas statute that precluded the execution of the mentally retarded as irrelevant to whether the applicant had defaulted an *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), claim by failing to bring the claim under the statute." The Eighth Circuit denied rehearing in *Jackson*, moreover, despite petitioner's argument that *Simpson*, and now *Jackson*, directly conflicted with *Adams*. Therefore, contrary to the respondent's argument, the question presented will not be resolved by the Eighth Circuit in a future case, but should be

[3] In *Sasser v. Norris*, No. 07-2385 (docketed June 15, 2007), which is presently pending before the Eighth Circuit, appellant Sasser relies on *Simpson* and *Jackson* to seek reversal of the district court's conclusion that his Eighth Amendment claim was procedurally defaulted because he failed to litigate the claim under the state statute.

here for the reasons argued in the Petition for a Writ of Certiorari.

II. The Direct Conflict With This Court's Decision In *Adams* Is Sufficient For This Court To Exercise Its Jurisdiction.

Respondent apparently agrees that, if the Eighth Circuit decided the question presented – which it did – the decision would directly conflict with *Adams*. He makes no effort to distinguish *Adams*, but, rather, highlights the aberrant nature of the Eighth Circuit's opinion in *Simpson*, and, now, *Jackson*, by asserting that there is no conflict among the circuits warranting an exercise of this Court's jurisdiction. Brief in Opposition at 7. Again, that is precisely the point. There indeed would be no conflict among the circuits warranting a settling decision from this Court where, as here, the Court settled the question years ago. The absence of any debate on the question is part and parcel of the direct conflict alleged in the petition – the Eighth Circuit has simply failed to follow settled principles which, apparently, have uniformly guided litigants and other courts.

III. The Miscarriage-Of-Justice Exception Does Not Independently Support The Judgment.

Respondent apparently asserts that this Court should decline to exercise its jurisdiction because the question is not actually presented by the record. Specifically, he asserts that the Court need not reach

the question of whether *Atkins*'s novelty excuses his default because the record demonstrates that the miscarriage-of-justice exception – that he is actually innocent of the death penalty – does. His argument appears to be based on two alternative premises. First, because the execution of a mentally retarded person is a miscarriage-of-justice in itself, all Eighth Amendment claims under *Atkins* categorically qualify for the exception – such that a habeas corpus petitioner satisfies the exception merely by asserting an *Atkins* claim. Brief in Opposition at 10. Second, that notwithstanding a categorical exception, he is a mentally retarded person who is exempt from the death penalty, and thus, "readily satisfies" the criteria for application of the exception. Brief in Opposition at 9. Because this Court has not held that *Atkins* claims categorically qualify for the miscarriage-of-justice exception, and, in any event, the respondent does not satisfy the criteria for the exception, the record does not demonstrate that the procedural default of respondent's *Atkins* claim would be excused independently of the question presented.

Not surprisingly, a majority of this Court has not yet established that *Atkins* claims categorically satisfy the miscarriage-of-justice exception. As this Court has recognized, a federal court's application of the exception is grounded in its equitable discretion, *e.g.*, *Herrera v. Collins*, 506 U.S. 390, 404 (1993), which is not amenable to categorical rules. For that reason alone, the record does not demonstrate that,

merely because he raised *Atkins* claim, the respondent satisfied the miscarriage-of-justice exception.

Additionally, the record does not demonstrate that respondent "readily satisfies" the existing criteria for application of the exception. To demonstrate actual innocence, a federal habeas corpus petitioner "must show, by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under applicable state law." *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). Respondent did not meet the evidentiary threshold because, as the District Court noted, "[h]is attorneys state in the habeas petition that they believe [respondent] is retarded, but the record contains *no evidence that he is*." Appendix at 38 (emphasis added). Moreover, as a practical matter, respondent could not demonstrate the causal connection between the Eighth Amendment error alleged in his *Atkins* claim and the purportedly erroneous finding that he is eligible for the death penalty. At the time of his trial, Arkansas already made mentally retarded persons ineligible for the death penalty and provided a procedure for raising claims of ineligibility. Consequently, a death penalty for an ineligible defendant did not occur in the absence of another constitutional error that led to the failure to invoke the state procedure – such as ineffective assistance of counsel. Respondent could have easily avoided the miscarriage-of-justice he now claims by either timely alleging that he was mentally retarded under Ark. Code Ann. § 5-4-618, or raising a

Sixth Amendment ineffective-assistance of counsel claim based on his trial counsel's failure to invoke the statute. He did neither, and, for all of the foregoing reasons, did not demonstrate below that the miscarriage-of-justice exception excuses his procedural default. Accordingly, the record does not support the judgment independently of the question presented.

IV. *Teague v. Lane*, And The Exceptions To Its Rule Against Retroactive Application Of New Constitutional Rules, Have No Bearing On The Merits Of The Petition.

In his final point in opposition to the Petition for a Writ of Certiorari, the respondent apparently defends the Eighth Circuit's judgment by arguing that, because *Atkins* is a new rule that qualifies for both exceptions to *Teague*'s rule barring retroactive application of new constitutional rules, his Eighth Amendment claim was previously unavailable, and thus, immune from procedural default despite *Adams*. He is mistaken.

As an initial matter, the availability of the same claim under state law made the previous availability of the federal claim immaterial to the Court's analysis in *Adams*. The Court concluded that *Caldwell* did not excuse the procedural default of Adams's Eighth Amendment claim without deciding whether a legal basis for the claim was reasonably available according to its jurisprudence prior to *Caldwell*. *See Adams*, 489 U.S. at 407. The "critical fact" in *Adams*, as here,

was not whether the legal basis of the claim was available according to this Court's jurisprudence, but that it was previously available under state law. *See Adams*, 489 U.S. at 407-08. Accordingly, even if this Court's jurisprudence prior to *Atkins* foreclosed Eighth Amendment mental-retardation claims, the Eighth Circuit's decision, which dismissed the availability of a mental-retardation claim under state law as irrelevant, remains in direct conflict with *Adams*.

Additionally, the fact that *Atkins* appears to be retroactively applicable to cases on collateral review does not immunize respondent's mental-retardation claim from procedural default, as he apparently claims. Respondent's argument conflates "novel," or "previously unavailable" claims, which may be excused from procedural default under *Ross*, with new constitutional rules, which generally cannot be retroactively applied to claims pending on collateral review under *Teague v. Lane*, 489 U.S. 288 (1989). While the two concepts may intersect when a retroactively applicable rule represents such a clear break with the past that the legal basis for a claim using the rule was unforeseeable, *see Ross*, 468 U.S. at 17, claims based on new, retroactively applicable rules are not *ipso facto* novel, or previously unavailable, to the point of excusing a procedural default. Indeed, in *Bousley v. United States*, 523 U.S. 614, 621-23 (1998), the Court held that, while a claim based on the new rule announced in *Bailey v. United States*, 516 U.S. 137 (1995) was not *Teague* barred, novelty could not excuse the petitioner's procedural default because the

legal basis for the claim was "most surely not a novel one." *Bousley*, 523 U.S. at 622; *see also Engle v. Isaac*, 456 U.S. 107, 134, n.43 (1982) (rejecting argument that a rule's retroactive effect excused the default of an otherwise available claim, citing prior decision that "acknowledged the distinction between the retroactive availability of a constitutional decision and the right to claim that availability after a procedural default"). Therefore, even if the rule in *Atkins* is retroactively applicable to mental-retardation claims pending on collateral review, that fact, alone, does not excuse respondent's procedural default. The legal basis for his mental-retardation claim must also have been unavailable to him, and, for the reasons argued in the Petition for a Writ of Certiorari, it plainly was available under state law.

CONCLUSION

The petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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